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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-353

CERTIFIED GROCERS OF ILLINOIS, INC., ET AL.,
Petitioners,

vs.

SPARKLE FOOD CENTER, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provision involved	2
Statement of the case	2
Reasons for granting the writ	4
I. The decision below conflicts with this Court's holding that private associations are not held to the due process requirements of the Fourteenth Amendment to the Constitution of the United States	4
II. Application of the due process guarantees of the Fourteenth Amendment to a private body such as Certified has extreme importance and far-reaching effects	8
Conclusion	9
Appendix A	A1
Appendix B	A11

AUTHORITIES CITED.

Cases.

Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) 4

Evans v. Gore, 253 U. S. 245 (1920) 9

FTC v. Cement Institute, 333 U. S. 683 (1948) 8

Moose Lodge No. 107 v. Irvis, ... U. S. ....., 92 S. Ct. 1965 (1972) 5,7

O'Brien v. Brown, ... U. S. ....., 92 S. Ct. 2718 (1972) 5

Parsons College v. North Central Ass'n of Colleges and Secondary Schools, 271 F. Supp. 65 (N. D. Ill. 1967) 7

Shelley v. Kraemer, 334 U. S. 1 (1948)..... 4

The Civil Rights Cases, 109 U. S. 3 (1883) 4

Van Daele v. Vinci, 294 F. Supp. 71 (N. D. Ill. 1968) .. 7

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vs.

SPARKLE FOOD CENTER, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioners, Certified Grocers of Illinois, Inc., and certain members of its Board of Directors at the time suit was filed,* pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this proceeding on March 30, 1972, as modified concurrently with denial of a timely petition for rehearing on May 25, 1972.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois, as modified, reported at 51 Ill. 2d 389, 282 N. E. 2d 728, and the

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* George Nepil, Gerhard Hook, Henry Vree, David Weiss, Ben Taubin, Peter Reviglio, Anthony Sobbe, Alfred C. Misch, Sam Rizzo, Edmund Dobski, Peter Zammuto, Albert Baukus and Walter Pauli. Henry Vinci, the former chairman of the Board, who was also a defendant, died while the Supreme Court of Illinois had this case under consideration.

opinion of the Appellate Court of Illinois, reported at 1
Ill. App. 2d 332, 264 N. E. 2d 41, are printed as Appendic
A and B, respectively.

JURISDICTION.

The Judgment of the Supreme Court of Illinois wa
entered on March 30, 1972. A timely filed petition for r
hearing was denied on May 25, 1972, and this petition fo
certiorari was filed within 90 days of that date. Jurisdic
tion is conferred on this Court by 28 U. S. C. § 1257(3)

QUESTION PRESENTED.

Whether the actions of a private voluntary associatio
which complied with its own constitution and by-law
must comport with the due process requirements of th
Fourteenth Amendment to the Constitution of the Unite
States.

CONSTITUTIONAL PROVISION INVOLVED.

U. S. Const. amend. XIV, § 1:

> Section 1. All persons born or naturalized in th
> United States, and subject to the jurisdiction thereof
> are citizens of the United States and of the State
> wherein they reside. No State shall make or enforce
> any law which shall abridge the privileges or immuni
> ties of citizens of the United States; nor shall any State
> deprive any person of life, liberty, or property, with
> out due process of law; nor deny to any person within
> its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

Certified Grocers of Illinois, Inc. ("Certified") is a
voluntary grocery cooperative owned by and operated for
the benefit of its retail grocer-members. (R. 407-09.) Prior

to April 9, 1969, respondents Sparkle Food Center, Inc. and Hickory Hills Super Mart, Inc., were members of the association. Pursuant to Section 22 of Article II of the by-laws of Certified, the Board of Directors notified respondents in writing of charges of by-law violations against them and held two days of evidentiary hearings on the charges. Respondents presented evidence and were actively represented by counsel at the hearings. On April 9, 1969, the Board of Directors adopted resolutions expelling respondents from membership in Certified. (R. 726-29.)

After receiving notice of the disciplinary hearings, but before the hearings were held, respondents had added a count challenging the disciplinary proceedings to a complaint in a derivative action which respondents and others had previously filed against petitioners in the Circuit Court of Cook County, Illinois. On April 21, 1969, respondents filed a Motion for Temporary Injunction and for Other Relief seeking to restrain enforcement of the expulsion resolutions passed by the Board of Directors. The motion for a temporary injunction was granted on May 5, 1969 (C.209), and, on September 30, 1969, a permanent injunction was entered on the ground that there was insufficient evidence to expel respondents under the by-laws of the association. (R. 172.)

Petitioners in this action perfected an appeal to the Appellate Court of Illinois, First District. The Appellate Court issued its opinion reversing the Circuit Court on September 16, 1970. Although respondents had raised the substantial federal questions of the denial of their rights to due process and of free speech under the First, Fifth, and Fourteenth Amendments, which they had also argued in the Circuit Court, the Appellate Court held that the judiciary will not regulate the internal activities of a private, voluntary association beyond a determination whether the association complied with the appropriate provisions of its by-laws. (Appendix B, p. A22.) In addition, the

Appellate Court held that there was no state action involved in the action of Certified's Board of Directors and therefore the constitutional principles which respondents had raised were inapplicable. (Appendix B, pp. A28-30.)

Respondents renewed their argument that the expulsion proceedings violated fundamental principles of due process of law, among other arguments, on appeal to the Supreme Court of Illinois. The Supreme Court found that Certified had complied with its By-Laws, but reversed the holding of the Appellate Court and held that "plaintiffs were denied due process of law at their disciplinary hearings" before Certified's Board of Directors because certain members of Certified's Board were not impartial. (Appendix A, p. A7.) (Mr. Chief Justice Underwood dissented in an opinion joined by Mr. Justice Davis. Mr. Justice Ward concurred specially, without opinion, as appears from the published reports. Mr. Justice Schaefer did not participate.)

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Conflicts with This Court's Holding That Private Associations Are Not Held to the Due Process Requirements of the Fourteenth Amendment to the Constitution of the United States.

The protections of the due process clause of the Fourteenth Amendment to the Constitution of the United States are available to an individual only when "state action" is found in the alleged deprivation of rights. Acts of private persons or organizations, absent state action, cannot violate the Fourteenth Amendment's due process clause. *The Civil Rights Cases*, 109 U. S. 3 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). This Court has recently considered and re-affirmed the requirement of state action in Fourteenth Amendment cases:

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in *The Civil Rights Cases, supra,* and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman* v. *Mulkey,* 387 U. S. 369, 380 S. Ct. 1627, 1634, 18 L. Ed. 2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition. *Moose Lodge No. 107* v. *Irvis,* ..... U. S. ....., 92 S. Ct. 1965, 1971 (1972).

In *O'Brien* v. *Brown,* ..... U. S. ....., 92 S. Ct. 2718 (1972), this Court again recognized the necessity of state action for a Fourteenth Amendment due process violation. The Court declined to consider the Democratic National Convention credentials challenges from California and Illinois because of inadequate time, but the opinions filed stated that one of the significant issues involved in the case was whether the state action necessary for a Fourteenth Amendment due process violation was present.

The decision of the Supreme Court of Illinois is in clear conflict with these settled principles. For that Court found a violation of due process in the actions of Certified, despite the absence of state action.

Although many issues were presented to the Supreme Court of Illinois, that Court's decision for respondents was based upon the constitutional due process issue. The Court specifically agreed that Certified's "Board did follow the procedures set out in the bylaws for disciplinary hearings." (Appendix A, p. A5.) It specifically refrained

from deciding whether the evidence presented at the Board hearings was sufficient. (Appendix A, p. A7.) And it omitted any mention of other issues raised by respondents, such as alleged violations of the constitutional right of free speech, the due process right to face accusers, and the claimed due process right to an explanation of the basis for the Board's ruling. (See Appellants' Brief in Supreme Court of Illinois.) The Court inferred from the circumstances that certain members of Certified's Board were biased* and stated its holding succinctly:

> Therefore we hold that under the facts presented in the instant case plaintiffs were denied due process of law at their disciplinary hearings. Consequently, the resolution expelling plaintiffs from Certified are (*sic*) invalid, and the circuit court properly enjoined Certified from enforcing the resolutions. (Appendix A, p. A7.)

Manifestly, there was no state action in this case. Certified is a private, voluntary organization of independent retail grocers doing business under the Co-operative Act (Ill. Rev. Stat. 1971, ch. 32, §§ 305-31) and the Business Corporation Act (Ill. Rev. Stat. 1971, ch. 32, §§ 157.1-.167). (R. 407-09.) Its charter under these statutes is the only significant contact which the association has with the state.

Two other courts have specifically considered whether Certified's actions involve state action so as to invoke the Fourteenth Amendment and have concluded that no state action is present. Prior to these proceedings in the Illinois courts between these petitioners and respondents, another member of Certified attempted to have the United States District Court for the Northern District of Illinois hear his complaints against petitioners. The District Court, however, dismissed the action after hearing arguments on the

* Respondents presented no evidence in the trial court showing bias or prejudice of Certified's directors, and the trial court found for petitioners on the issue. (R. 114.)

issue of federal question jurisdiction. The Court specifically rejected arguments which sought to establish "state action" as a basis for jurisdiction.

> The defendants are private individuals and a private corporation. The only factual basis the plaintiff asserts in support of his allegation of state action is that Certified received its charter under state law and that it acted pursuant to bylaws adopted under its charter in the expulsion action. Merely acting under a state license is not state action within the context of the civil rights acts. *Van Daele* v. *Vinci*, 294 F. Supp. 71, 74 (N. D. Ill. 1968.)

The Illinois Appellate Court specifically considered and rejected respondents' argument that state action was present in this case: "[T]he proceedings affecting plaintiffs' membership status were private in nature and did not constitute state action or action under color of state law." (Appendix B, p. A30.) The Appellate Court quoted from an opinion of the United States District Court for the Northern District of Illinois, in which that court refused to apply the constitutional guarantees of the Fifth and Fourteenth Amendments to another private association:

> . . . With a corporate charter granted under general law, the Association stands on the same footing as any private corporation organized for profit or not. . . . The termination of membership in a private association, organized to maintain the standards in a profession or calling, do not, therefore, present a federal question. *Parsons College* v. *North Central Association of Colleges and Secondary Schools*, 271 F. Supp. 65, 71 (N. D. Ill. 1967.)

The findings of the Illinois Appellate Court and the United States District Court for the Northern District of Illinois that there was no state action in Certified's proceedings—which findings were not disputed by the Supreme Court of Illinois—are clearly correct. Just as in *Moose*

Lodge No. 107 v. *Irvis*, ___ U. S. ___, 92 S. Ct. 1965 (1972), the fact of having a state corporate charter and the presentation of a controversy to a state court are not sufficient to raise state action.

II. Application of the Due Process Guarantees of the Fourteenth Amendment to a Private Body Such as Certified Has Extreme Importance and Far-Reaching Effects.

Petitioners will not belabor in this Petition the impact and importance of a decision holding that the actions of private associations will be reviewed by the courts under due process standards. There are, however, two aspects of the present case which emphasize that impact.

This is not a case in which association membership is essential to pursuit of a livelihood, such as in the case of a professional association. Membership in Certified is not an economic necessity. The record shows that Certified is one of a number of sources of grocery supply available to respondents. (C.52.) Therefore, even if it were warranted to apply stricter standards to certain types of associations, such as labor unions or professional associations, it would not be appropriate to adopt the broad rule enunciated by the Supreme Court of Illinois in this case.

Moreover, in this case, the Supreme Court of Illinois has applied the due process clause in a way in which this Court has indicated it should not be applied, even assuming the presence of governmental action. For under Certified's By-Laws, Certified's Board was the only body which could determine whether to expel a member. (R. 390.) A grievance committee could have been appointed to hear evidence, but it would have been required to report to the Board of Directors, which had ultimate responsibility for the decision. In such circumstances, this Court has consistently held that the designated tribunal, even assuming prejudice, could hear and decide the case. *FTC* v. *Cement*

Institute, 333 U. S. 683, 700-03 (1948); *Evans* v. *Gore*, 253 U. S. 245, 247-48 (1920).

If it is possible to find a violation of due process in this case, then clearly the barriers established early by this Court in *The Civil Rights Cases* and so recently reaffirmed by *Moose Lodge* have been removed. Every corporation, unincorporated association, and, indeed, every band of people would be subject to the same constitutional guarantees and restraints which are applicable to the United States and the State governments, and the Fourteenth Amendment would be stretched and extended far beyond its draftsmen's intent.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

August 30, 1972.

Respectfully submitted,

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APPENDIX A.

Docket No. 43855—Agenda 42—May, 1971.

AUGUST A. VAN DAELE ET AL., *Appellants*, v. HENRY VINCI ET AL., *Appellees*.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

We granted leave to appeal from a reversal by the appellate court (*Van Daele* v. *Vinci*, 129 Ill. App. 2d 332) of a judgment of the circuit court of Cook County permanently enjoining Certified Grocers of Illinois, Inc. (hereinafter Certified) from enforcing resolutions of Certified's board of directors (hereinafter the Board) to expel plaintiffs from membership in Certified or to take any punitive action against plaintiffs by resaon of the resolutions.

The pleadings alleged that Certified is a private, voluntary organization of independent retail grocers doing business under the Co-operative Act (Ill. Rev. Stat. 1969, ch. 32, pars. 305-331) and the Business Corporation Act (Ill. Rev. Stat. 1969, ch. 32, pars. 157.1-157.167). Certified's purpose is to secure lower prices through large volume purchasing. It then sells these products to its members at a slightly increased price. After Certified pays its own operating expenses, a portion of the excess is refunded to the members as a rebate, and the remainder is used for its own purposes, *i.e.*, reserves, expansion and business loans to its membership.

On January 30, 1969, Certified's Board sent written notices to plaintiffs, Hickory Hills Super Mart, Inc. (hereinafter Hickory) and Sparkle Food Center, Inc. (hereinafter Sparkle), notifying them of a special Board meeting

to be held on February 25, 1969. The purpose of the meeting was to determine whether Hickory and Sparkle should be censured, suspended or expelled as members of Certified pursuant to the corporate bylaws. The charges against Hickory and Sparkle arose from the alleged activities of Adolph Kalchbrenner, a shareholder and president of Hickory, and Frank R. Guinta, a shareholder and officer of Sparkle. It was alleged that Kalchbrenner and Guinta "associated with the 'Certified Stockholders Committee for Fair and Better Management,' disrupted Certified's business, impeded the resolution of problems associated with Certified's construction program, spread false rumors and made untrue statements which were intended to and which did injure Certified's directors and officers, and engaged a public relations firm to publicize charges against Certified for the purpose of aiding the election of the Stockholders' Committee's nominees to the Board of Directors of Certified." (129 Ill. App. 2d 332, at 336.) The notice also advised plaintiffs that each could be assisted by legal counsel during the proceedings.

Pending at this time was a derivative class-action suit, filed in the circuit court of Cook County, by Hickory, Sparkle and other shareholders of Certified, against the chairman and other members of the Board averring that the defendants knew or should have known of the alleged activities of one of Certified's employees whose malfeasance in the operation of Certified's building program resulted in the loss of large sums of money by Certified.

On February 21, 1969, plaintiffs amended their complaint adding a count in which they informed the court of the special board meeting and alleging, *inter alia*, that they would not receive a fair hearing before the Board because many of the Board members were defendants in the present action and that the Board was seeking retribution rather than acting in good faith in convening this disciplinary

proceeding. Hickory and Sparkle prayed for injunctive relief to prevent the defendants "from taking any action to censure, suspend or expel them from membership in Certified." (129 Ill. App. 2d 332, at 336.) The trial court continued disposition of the equitable prayer until the Board acted on the pending charges.

At hearings before the Board on February 25 and April 9, 1969, plaintiffs made motions to dismiss the charges, to disqualify various Board members because of prejudice, and to preclude any Board member from participating if he might profit from plaintiffs' expulsions. These motions were denied.

The attorney for the Board then introduced various papers designated as exhibits, excerpts from sworn depositions, and trial testimony obtained in connection with other counts in the complaint. After presentation of this evidence, the Board again denied plaintiffs' motion to dismiss the charges.

Plaintiffs introduced proof which showed that they were members in good standing with Certified. Data on plaintiffs' rebates for prior years was also offered which indicated that during those years Sparkle had averaged approximately $40,700 and Hickory had averaged approximately $22,400 per year. No witnesses were presented by either side, although plaintiffs sought to call the Board chairman, who refused to testify, and the Board refused to request or direct him to do so. It then adopted resolutions excluding the plaintiffs from further membership in Certified.

Thereafter, the circuit court granted a temporary injunction and subsequently, after consideration of the Board's proceedings and exhibits, the court permanently enjoined Certified from expelling plaintiffs from membership in accordance with the Board's resolution of April 9, 1969. On appeal the appellate court reversed.

Plaintiffs now argue that the expulsion proceedings were so grossly unjust that they violated fundamental principles of due process of law. To support this position plaintiffs contend that the Board could not fairly hear these matters because many of its members were involved in the events which gave rise to the charges.

Certified's bylaws provide that a member can only be expelled by "the affirmative vote of not less than two-thirds of the directors present at a board meeting." The record before us indicates that the Board preferred the charges against plaintiffs and the resolutions to expel Hickory and Sparkle were adopted by vote of eleven Board members of which seven were defendants in the pending lawsuit. Both Hickory and Sparkle were expelled by ten affirmative votes. Thus it is apparent that at least six defendants voted to expel each plaintiff.

Furthermore, plaintiffs maintain that charges were initiated against them by the Board and the evidence was introduced by the same attorney who was representing the seven Board members in the instant case. Thus the directors were placed in the contradictory position of being both prosecutors and judges.

To refute these contentions defendants maintain that plaintiffs were allowed all appropriate protections in that Hickory and Sparkle were given notice of the pending charges and permitted to discredit these charges at the hearings. In addition plaintiffs were granted every request for information or production of documents. Moreover, defendants assert that the Board was not precluded from hearing the allegations simply because the Board had originated the charges. (*Green* v. *Board of Trade*, 174 Ill. 585.) Defendants finally argue that since the corporate bylaws exclusively authorize expulsion by Board action, the allegation of bias is immaterial.

While agreeing that the Board did follow the procedure set out in the bylaws for disciplinary hearings, we cannot find the defendants' final contention persuasive. There are too many factors indicating that the proceedings were in fact not good faith disciplinary hearings, but in reality, an attempt to silence and censure dissident members of the association. The record clearly shows that the Board was comprised of seven members that were also defendants in the pending derivative action. The allegations against the plaintiffs were supported entirely by the depositions, excerpts of record, and statements taken for use in the suit which were introduced in an attempt to authenticate various exhibits. The Board's decision to expel plaintiffs was based on at least six of the defendants voting against the plaintiffs. The bylaws provide that a commission could be appointed to investigate the conduct of members and report to the Board independently to avoid the possibility of bias in situations where the board members could be biased. All these facts indicate a strong possibility that the plaintiffs were not given a fair hearing.

Although the courts in this State traditionally been reluctant to interfere in the internal operations of associations, this strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act. We agree with the view expressed by the Supreme Court of New Jersey that said: "We are here concerned with and therefore deal solely with an organization, membership in which may here, in the language of *Trautwein*, be viewed as an economic necessity; in dealing with such an organization, the court must be peculiarly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objective of

the organization. [Citations.]" *Falcome* v. *Middlesex County Medical Soc.*, 34 N. J. 582, 592, 170 A. 2d 791, 796-7.

We recognize that strict adherence to judicial standards of due process would be arduous and might seriously impair the disciplinary proceedings of voluntary associations such as retail grocers. (*Gottlieb* v. *Economy Stores, Inc.*, 199 Va. 848, 102 S. E. 2d 345.) However, one subjected to such disciplinary actions should be accorded a hearing before a fair and impartial tribunal. To hold otherwise would be a denial of essential rights. We agree "that a private organization, particularly if tinged with public stature or purpose, may not expel or discipline a member adversely affecting substantial property, contract or other economic rights, except as a result of fair proceedings which may be provided for in organization by-laws, carried forward in an atmosphere of good faith and fair play." (*McCune* v. *Wilson* (Fla. 1970), 237 So. 2d 169, 173.) The rationale for this position as enunciated in *McCune* results from the character of the organization, *i.e.* its assumption of a purpose which exceeds merely that of a social organization and its endeavor to benefit from various State and Federal laws.

We are mindful of the caveat set forth in *Hall* v. *Morris* (Mo. Ct. App. 1927), 293 S. W. 435, wherein the court expressed the view that one who faces disciplinary proceedings before a tribunal in a voluntary associaton need only vilify the entire organization thereby rendering all members of that body incompetent to try him, and, consequently, rendering the group totally incapable of defending itself against the vicious, unwarranted attacks of a member. If such a situation were to develop, however, we believe that the association is capable of formulating proper disciplinary procedures. See *Madden* v. *Atkins*, 4 App. Div. 2d 1, 162 N. Y. S. 2d 576.

In the instant case the trial court stated that "in the entire proceedings here, unfortunately the record indicated significant personality differences which * * * played a large part in the actions which were taken * * *." In view of this latter impression we must conclude that certain members of the Board were not impartial.

Therefore we hold that under the facts presented in the instant case plaintiffs were denied due process of law at their disciplinary hearings. Consequently, the resolution expelling plaintiffs from Certified are invalid, and the circuit court properly enjoined Certified from enforcing the resolutions.

Plaintiffs further contend that the expulsions should be enjoined because no evidence was introduced at the Board hearings to support any of the five charges brought against Hickory and Sparkle. However, we need not pass upon this issue or other contentions advanced by plaintiffs because of our disposition of the primary issue.

For the aforementioned reasons the decision of the appellate court is reversed and the restraining order of the circuit court of Cook County is affirmed.

Appellate court reversed;
circuit court affirmed.

MR. JUSTICE SHAEFER took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE UNDERWOOD, dissenting:

I cannot agree that the circumstances of this case justify the substantial departure from settled law which the majority opinion represents. As the well-considered opinion of Mr. Justice Drucker, speaking for the appellate court, notes, the heretofore prevailing rule, as announced

in the earlier opinions of this court, has been that judicial supervision and intervention were generally limited to a determination that the voluntarily agreed to provisions of the bylaws and rules of the organization were adhered to in resolving disagreements among its members. *People ex rel. Rice* v. *Board of Trade,* 80 Ill. 134; *Sturges* v. *Board of Trade,* 86 Ill. 441; *Pitcher* v. *Board of Trade,* 121 Ill. 412; *Ryan* v. *Cudahy,* 157 Ill. 108; *People ex rel. Keefe* v. *Women's Catholic Order of Foresters,* 162 Ill. 78; *Board of Trade* v. *Nelson,* 162 Ill. 431; *Green* v. *Board of Trade,* 174 Ill. 585; *Bostedo* v. *Board of Trade,* 227 Ill. 90; *Engel* v. *Walsh,* 258 Ill. 98; *Werner* v. *International Association of Machinists,* 11 Ill. App. 2d 258. See also *Parsons College* v. *North Central Association of Colleges and Secondary Schools* (N. D. Ill. 1967), 271 F. Supp. 65.

The question as to the extent to which due process standards applicable to public agencies may or should be imported into the internal operations of associations which are basically private in nature is not one which I find easily answered. The answer provided by the majority opinion, however, is completely superficial. That answer is that "the bylaws provide that a commission could be appointed to investigate the conduct of members and report to the board independently to avoid the possibility of bias." The superficiality of this solution is that it is not the partiality of the investigators which is the real issue—it is the bias alleged to exist among members of the Board. Certainly appointment of a disinterested committee to investigate does little to remedy partisanship on the part of members of the adjudicatory body (the Board) to which the committee reports. It is alleged bias in that body which is the real issue here. The appointment of a commission does nothing to resolve it.

It is clear that, broadly stated, courts have adhered to a policy of nonintervention in cases of refusal to admit or

expulsion from social, fraternal and religious organizations (*Falcone* v. *Middlesex County Medical Society*, 34 N. J. 582, 170 A. 2d 791 and cases there cited; Sheridan, Judicial Review of Expulsions From Private Associations, 521 I. B. J. 842.) It is equally clear, however, that an increasingly greater willingness to intervene is manifested in those cases dealing with professional associations exercising virtually monopolistic control in which membership is essential or of substantial importance to the individual in earning a livelihood. *Falcone* and cases there cited.

The basis for judicial reversal of association action has, again speaking broadly, ordinarily been a violation of the constitution or bylaws of the association, or, that the association rules and proceedings violate concepts of fundamental fairness, or, that the association action was motivated by prejudice or bad faith. (*Sheridan*, pp. 847-8.) There has been, as noted by the majority, no violation of the association bylaws in the case before us, nor do these regulations violate concepts of basic procedural justice. The sole ground for reversal relied upon by the majority is that members of the board of directors which voted to expel plaintiffs may have been prejudiced by reason of the fact that the Board had instituted the charges and had been made defendants in prior litigation initiated by plaintiffs. The court's opinion agrees that the Board is "not necessarily disqualified," but holds the Board should have appointed an investigating committee "free from any assertions of bias and agreed to be bound by the committee's report."

In my judgment the circumstances of this case do not warrant the conclusion reached by the court. Certified, while a sizeable association, can scarcely be thought to be monopolistic. Its members, including plaintiffs, agreed to the terms of its bylaws by applying for membership. There is nothing therein which offends a sense of fundamental

fairness except the fact that some members of the Board which is vested with the ultimate responsibility for disciplining the membership may, as a result of plaintiffs' prior activities, be predisposed in their approach to the expulsion question. But it is precisely this same body which is presumably the most knowledgeable group concerning the welfare and best interests of the association. Similarly, it is this group which is likely to be most aware of, and best able to accurately assess the effect of, the conduct of the association's members. To say that such awareness prevents them from exercising the authority vested in them by agreement of the membership, including plaintiffs, is likely, I believe, to seriously impair the operating efficiency of such associations. One effect will be to enable dissident members, by the simple expedient of criticizing all other members, to render the association and its members incompetent to try them. While the majority optimistically states that, given such situation, "we believe that the association is capable of formulating proper disciplinary procedures", I believe it preferable to avoid that possibility.

In short, while agreeing that there are circumstances wherein judicial intervention in the operation of voluntary associations is not only appropriate, but is necessary, I believe that power should be used sparingly and only under circumstances more compelling than those existing here.

I would affirm the judgment of the appellate court.

Mr. Justice Davis joins in this dissent.

APPENDIX B.

34576

AUGUST A. VAN DAELE, SPARKLE FOOD CENTER, INC., and HICKORY HILLS SUPER MART, INC.,
Plaintiffs-Appellees,

vs.

HENRY VINCI, GEORGE NEPIL, GERHARD HOOK, HENRY VREE, DAVID WEISS, BEN TAUBIN, PETER REVIGLIO, ANTHONY SOBBE, ALFRED C. MISCH, SAM RIZZO, EDMUND DOBSKI, PETER ZAMMUTO, ALGERT BAUKUS, CERTIFIED GROCERS OF ILLINOIS, INC., a corporation, and WALTER PAULI,
Defendants-Appellants.

Appeal from Circuit Court of Cook County.

Honorable Walter P. Dahl and George N. Leighton, Presiding.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

This action, Count IV of a multicount complaint against defendants, was brought to enjoin disciplinary action against plaintiffs as members of a private, voluntary incorporated association and for other relief. The trial court granted plaintiffs' motion for a temporary injunction, and subsequently a permanent injunction was issued restraining defendant corporation, Certified Grocers of Illinois, Inc., (hereinafter "Certified") its employees, representatives, servants and agents, from taking any action to carry out the resolutions of the Board of Directors of Certified (hereinafter "Board") expelling plaintiffs as members, and from taking any punitive action against the plaintiffs by reason

of the resolutions. Defendants appeal from these injunction orders.

A summary of the events culminating in the trial courts' injunction orders follows. On January 30, 1969, the Board sent notices to the plaintiffs, Sparkle Food Center, Inc., (hereinafter "Sparkle") and Hickory Hills Super Mart, Inc., (hereinafter "Hickory") of a special meeting of the Board to be held on February 25, 1969, for the purposes of determining whether Sparkle and Hickory should be censured, suspended or expelled as members of Certified pursuant to Section 22 of Article II of Certified's by-laws. The charges were based upon the alleged acts of Frank R. Guinta, a shareholder and officer of Sparkle, and Adolph Kalchbrenner, a fifty percent shareholder and President of Hickory. It was charged that these men associated with the "Certified Stockholders Committee for Fair and Better Management," disrupted Certified's business, impeded the resolution of problems associated with Certified's construction program, spread false rumors and made untrue statements which were intended to and which did injure Certified's directors and officers, and engaged a public relations firm to publicize charges against Certified for the purpose of aiding the election of the Stockholders' Committee's nominees to the Board of Directors of Certified. ...

The notifications sent to plaintiffs further advised them that:

> You may be present at said meeting and present such evidence, make such arguments as you may deem necessary in your defense, and you may be accompanied by legal counsel to assist and advise you during the course of said proceedings.

On February 21, 1969, four days before the expulsion hearing was to be held, plaintiffs amended a previously filed complaint in the Circuit Court by adding Count IV in

which Sparkle and Hickory sought equitable relief against Certified. Sparkle and Hickory prayed for a temporary and permanent injunction restraining the defendants from taking any action to censure, suspend or expel them from membership in Certified. In response, defendants filed a verified answer to Count IV denying the material allegations therein set forth. The trial court continued the cause in order to determine what action the Board would take based on the charges brought against the plaintiffs.

Hearings before the Board were held on February 25 and April 9, 1969. At the hearings plaintiffs made several preliminary motions. They moved to disqualify specific members of the Board as being prejudiced; to disqualify those who would allegedly profit in the event of plaintiffs' removal; and to dismiss the statement of the charges. These motions were denied by the Board. Plaintiffs also requested that any person not a member of the Board be excluded from the hearing room. This request was granted and several non-members of the Board were excused. The Board's attorney then presented the evidence in support of the charges against plaintiffs. The evidence consisted of documents marked as exhibits, excerpts from transcripts of sworn testimony given in depositions, and trial testimony taken with respect to other counts of plaintiffs' multicount complaint. After the Board's counsel rested, plaintiffs again moved to dismiss the charges. The Board in a vote of ten in favor and one abstention denied plaintiffs' motion. The plaintiffs, through their private counsel, offered as their only proof in opposition to the Board's charges their good standing membership in Certified through the years and their rebate schedules for the past several fiscal years.[1]

1. Certified is a grocery cooperative whose members are independent retail grocers. Certified's members purchase almost all of their groceries, meats, produce and milk products through Certified, and thereby obtain the benefit of large volume, low-cost purchasing. Certified manufactures and processes several large

After closing arguments of counsel, the directors by a vote of ten to one approved resolutions expelling the plaintiffs as members of Certified effective April 9, 1969. Plaintiffs were permitted to purchase merchandise from Certified until May 9, 1969.

Subsequent to the Board's passage of the expulsion order, Sparkle and Hickory filed a motion for a temporary injunction to restrain enforcement of this resolution and on May 5, 1969, a temporary injunction enjoining defendants' enforcement of their expulsion order was issued.

Thereafter Hickory and Sparkle sought a permanent injunction. The trial court considered Count IV of plaintiffs' second amended and supplemental complaint, defendants' answers, the transcripts of the hearings before the Board on February 25, 1969, and April 9, 1969, relating to the expulsion of Sparkle and Hickory, and the exhibits introduced at these hearings. On September 30, 1969, the trial court entered an order permanently enjoining Certified from taking any action to carry out the resolution of the Board expelling plaintiffs as members of Certified and from taking any punitive action against plaintiffs by reason of the April 9, 1969, expulsion resolution.

Opinion.

Defendants contend that the courts cannot interfere with plaintiffs' expulsions from Certified since (1) it is a private,

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volume products such as milk, dairy products, beverages and ice cream.

Certified charges its members more than Certified's cost for the products delivered. However, part of the excess payment is then refunded annually to members in the form of a patronage rebate or dividend. The remainder of the excess payment is used to pay Certified's operating expenses and retained for reserve accounts or surplus. By pooling members' funds and resources Certified is able to accumulate capital which it uses for its own reserves, for plant expansion, or to make loans to its member grocers.

voluntary incorporated association and (2) the disciplinary proceedings conducted by the Board were in accordance with Certified's by-laws, by which plaintiffs agreed to be bound when they purchased and were issued their shares of stock in the corporation. In a series of cases the courts of this state have established the principle that they would not interfere with or regulate the internal activities of a voluntary association. *People ex rel. Rice* v. *Board of Trade,* 80 Ill. 134; *Sturges* v. *Board of Trade,* 86 Ill. 441; *Pitcher* v. *Board of Trade,* 121 Ill. 412; *Ryan* v. *Cudahy,* 157 Ill. 108; *People ex rel. Keefe* v. *Women's Catholic Order of Foresters,* 162 Ill. 78; *Board of Trade* v. *Nelson,* 162 Ill. 431; *Green* v. *Board of Trade,* 174 Ill. 585; *Bostedo* v. *Board of Trade,* 227 Ill. 90; *Engel* v. *Walsh,* 258 Ill. 98; *Werner* v. *International Association of Machinists,* 11 Ill. App. 2d 258. See also *Parsons College* v. *North Central Association of Colleges and Secondary Schools,* 271 F. Supp. 65 (N. D. Ill. 1967).

In *Engel* v. *Walsh, supra,* 103, the court in reviewing its prior decisions based on judicial non-intervention in the affairs of private, voluntary associations stated:

> The courts have frequently been called upon to restrain voluntary associations, such as churches, lodges of various kinds, boards of trade, and the like, from expelling members for an alleged violation of some rule or regulation of the association, and in such cases this court has uniformly refused to sanction the practice of calling on a court of equity to adjust disputes arising between such associations and its members, . . . In *People* v. *Board of Trade,* 80 Ill. 134, on page 137, it was said: "The board of trade, so far as we can see, is only a voluntary organization, which its charter fully empowers it to govern in such mode as it may deem most advisable and proper. It has adopted its by-laws, provided a forum for their enforcement, which has acted thereunder, and the court will not interfere

> to control its action." In churches, lodges, labor unions, and other like voluntary associations, each person on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization. (*Bostedo* v. *Board of Trade*, 227 Ill. 90.) Courts will not interfere to control the enforcement of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government.

See also *Parsons College* v. *North Central Association of Colleges & Secondary Schools, supra,* for a more recent statement of the controlling Illinois law.

In *Board of Trade* v. *Nelson, supra,* Nelson was suspended by the Board pursuant to its by-laws. Nelson sought a writ of mandamus to compel the board to permit him to resume his privileges. The court held that since the Board was a voluntary association it would not interfere with the Board's disciplinary powers. In its opinion the court discussed the contract obligation which existed between the Board and its newly accepted members. At page 438 the court said:

> This corporation is not bound to admit any person to membership, nor was the relator in any way forced into such association. *He voluntarily became a member, and by his contract is bound to abide by the rules and regulations of the board.* The courts will never interfere to control the enforcement of by-laws of such associations, but they will be left to enforce their rules and regulations by such means as they may adopt for their government. . . . The court has repeatedly refused to interfere with the disciplinary powers of this board, in equity as well as at law. [Emphasis ours.]

In the instant case a similar contract obligation existed between Certified and plaintiffs. Article XV of Certified's by-laws provides in part:

> These By-Laws, and any amendments hereinafter adopted, and any Rules and Regulations promulgated pursuant thereto, *shall constitute a contract between the corporation and the shareholders, and between the shareholders, and shall be binding on all shareholders,* their successors, heirs, executors, administrators, assigns and personal representatives, as the case may be. *The purchase of shares and the issuance thereof to any shareholder shall constitute and be equivalent to a consent to be bound by these By-Laws and the Rules and Regulations promulgated pursuant thereto and an agreement on such shareholder's part to be bound thereby.* [Emphasis ours.]

Therefore, as in *Nelson,* Certified and plaintiffs under their contract were bound by the corporation's by-laws then in effect.

Article II, Section 22 of the by-laws provides for the censure, suspension or expulsion of a member of Certified. By its contract with plaintiffs the Board was required to follow the procedural rules set forth in this section. Section 22 provides in part:

> SECTION 22. CENSURE, SUSPENSION OR EXPULSION. The Board of Directors, for good cause, and in its discretion, may censure, suspend, or expel a member.
>
> Violation of the By-Laws or Rules and Regulations shall constitute good cause. The spreading of false rumors concerning the officers, directors or management of the corporation, or one or more of them, or the corporation, or the making of untrue, misleading or disparaging statements or remarks concerning them or one or more of them, with the intention and calculated in injure or which may have a tendency to or does injuriously affect the standing, prestige or influence of the officers, directors, management of the corporation and the corporation, or either of them, shall also constitute good cause.
>
> It shall require the affirmative vote of a majority of the directors present at any board meeting to censure

or suspend a member, but shall require the affirmative vote of not less than two-thirds of the directors present at a board meeting, to expel a member.

Notice shall be given to any accused member of the intention of the Board of Directors to consider and determine whether such member shall be censured, suspended or expelled, and date time and place of the meeting. Notice to such member shall specifically state the provision or provisions of the By-Laws or Rules and Regulations which have been violated or the improper conduct, constituting good cause as herein defined. The accused member may appear at the Board meeting and present such evidence or make such arguments as he may deem necessary in defense of himself.

• • • • •

The decision of the Board of Directors as expressed in any order or resolution of censure, suspension or expulsion, shall be final, unappealable, and binding on the affected member.

Pursuant to Section 22 notices were sent to plaintiffs almost one month before the scheduled disciplinary hearing was to be held. The notices advised plaintiffs of the intention of the Board to consider disciplinary action against them including possible expulsion, and further cited the by-laws violated and the conduct constituting "good cause" for possible expulsion, censure, or suspension. The notices also specified the time and place of the special Board hearing and provided that plaintiffs could present evidence and arguments in their defense with the assistance of legal counsel.

At the disciplinary hearings which were held by the Board plaintiffs were represented by private counsel, and they were given the opportunity to present evidence and make arguments in their defense. Furthermore, the Board's vote to expel each plaintiff was ten to one, which was greater than the necessary two-thirds requirement to expel a member.

Plaintiffs argue, however, that the Board failed to follow the provisions of Section 22 of the by-laws by its failure to appoint a grievance committee. This specific clause in Section 22 provides that:

> The Board of Directors may appoint a grievance committee authorized to make the necessary investigation, hear evidence and make its report of findings to the Board of Directors.

The appointment of a grievance committee by the Board is not mandatory. Nowhere within this provision is the final decision to censure, suspend, or expel a member shifted from the Board to the grievance committee. The committee "may" be appointed by the Board to hear evidence but its findings are then reported to the full Board. The ultimate responsibility to decide the facts and to take the necessary action based on these facts lies with the Board, for only they can vote to censure, suspend, or expel a member as provided by Certified's by-laws.

We find no prejudice to plaintiffs in the fact that the Board did not appoint a grievance committee.

Plaintiffs urge this court to adopt what they contend is a new body of law in the field of private, voluntary associations. They argue that while the courts of this state were once reluctant to intervene on behalf of a member of a private, voluntary association to prevent his expulsion, regardless of the circumstances, the courts have now developed a body of law which guarantees to members of voluntary incorporated associations full judicial review of the sufficiency of the evidence. Plaintiffs cite *Morgan* v. *Local 1150, United Electrical, Radio and Machine Workers of America*, 331 Ill. App. 21; *Werner* v. *International Association of Machinists*, 11 Ill. App. 2d 258; *O'Brien* v. *Matual*, 14 Ill. App. 2d 173; and *Virgin* v. *American College of Surgeons*, 42 Ill. App. 2d 352, to indicate that the trial court

properly reviewed the evidence presented at the expulsion proceedings and held that their rights had been violated.

In *Morgan, supra,* the chancellor entered a decree which found that the union's executive board order for the expulsion of Morgan was null and void; directed that the orders of expulsion be expunged; and enjoined the defendants from enforcing the expulsion order. On appeal the court reversed the chancellor's findings. The court found that Morgan received a fair trial under the methods of procedure set up by the local union and that not having exhausted his remedies by appeal to the national union, he was precluded from invoking the jurisdiction of a court of equity to set aside his expulsion and order his reinstatement. The court stated that the essential requirements for a fair hearing were: notice in writing, a clear statement of the charges, and an opportunity to appear and defend; and that such protections were afforded Morgan under the union's constitution. As heretofore determined in the instant case, the plaintiffs were given notice of the hearing in writing; the notice contained a clear statement of the charges; and they were allowed to appear at the hearing and participate in the proceedings.

In *Werner, supra,* as in *Morgan,* the court refused to intervene in a union's disciplinary proceedings. Werner complained that he had been expelled from the union through false and fictitious charges; that the charges were neither specified nor furnished to him; and that his request for a continuance was denied. The court found that Werner had been advised of the nature of the charges; that a copy of the charges had been furnished to him; and that the request for continuances did not have to be granted. Thus, the court held that there was nothing in Werner's amended complaint that would justify the trial court to redress his grievances and it affirmed the dismissal of his complaint.

We note that the court in *Werner* did not inquire into the sufficiency of the evidence of the "false and fictitious charges" argued by Werner on appeal.

In *O'Brien* v. *Matual, supra,* the trial court enjoined a temporary trustee appointed by the international union's president from interfering with the local union's operations. On appeal by the temporary trustee the court upheld the injunction. However, it appears that the court based its decision on the failure of the national union to abide by its constitution in affording the local officers notice and a legal hearing. Therefore, we believe that the *O'Brien* decision was a limited judicial intervention to determine whether the proper procedures were followed by the union and was not the full scale judicial review of the evidence as is suggested by plaintiffs. The same may be said of *Morgan* and *Werner.*

Plaintiffs also rely on *Virgin* v. *American College of Surgeons, supra.* Dr. Virgin was expelled from the American College of Surgeons based on charges of which he was never informed and he was afforded no opportunity to present his side of the case. Furthermore, the expulsion meeting of the Board of the College was held without notice to Dr. Virgin. The trial court found against Dr. Virgin and dismissed his application for declaratory judgment seeking reinstatement. However, on appeal the court held that Dr. Virgin was never legally expelled from the College and directed the trial court to enter a writ of mandamus commanding the College to reinstate him. At page 371 the court states:

> It is, therefore, clearly apparent that Dr. Virgin was not given notice according to the bylaws. He never received any registered mail as the bylaws required, nor was he at anytime allowed to confront his accusers or given a fair hearing upon the charges against him. He was never given any idea of what charges were

> presented against him. The hearing did not in any way meet the requirements of due notice and proper hearing upon the question of his expulsion and is, therefore, void and the expulsion must be set aside.
>
> It is clear that the requirements were not met and the hearing is, therefore, invalid.
>
> We hold that Dr. Virgin was never legally expelled from the college and the mandamus must be directed to be entered.

Accordingly, in *Virgin* as in *O'Brien*, the failure of the association to abide by its by-laws was the basis for the court's intervention in the association's internal affairs and not to review the sufficiency of the evidence for expulsion.

As we have shown, in none of the four Illinois cases advanced by plaintiffs did the court in fact consider the sufficiency of the evidence. Therefore, we cannot agree with nor adopt plaintiffs' theory that the Illinois courts have developed a new body of law in which they will review the sufficiency of the evidence presented at a disciplinary hearing. We are also not persuaded by the two New York cases cited by plaintiffs in support of this same argument. *Harmon* v. *Matthews*, 27 N. Y. S. 2d 656, and *Madden* v. *Atkins*, 162 N. Y. S. 2d 576.

Even though some of the Illinois cases which declare a limited judicial intervention into the affairs of a voluntary association are "Nineteenth Century" they still reflect this state's law. While the courts will regulate the internal activities of a private, voluntary association to insure compliance with the procedures established by their by-laws, the courts will decline to intervene on behalf of an expelled member where he seeks a full judicial review of the evidence on which his expulsion was based.

In the instant case it was the function of the Board to determine from the evidence whether "good cause" for

plaintiffs' expulsions had been established. It was also the function of the Board to act in the best interests of the entire association and it was its responsibility to interpret the by-laws to which plaintiffs had agreed when they joined the association. The charges were not denied by the plaintiffs nor was any counterproof offered by them. Therefore we hold that the trial court improperly substituted its judgment for that of the Board in determining whether "good cause" had been shown for plaintiffs' expulsion.

Plaintiffs also contend that their expulsions were invalid because the requirements of due process were not met. Plaintiffs first argue that Certified's Board was not impartial because many of the members were involved in the events which gave rise to the charges against them and because the Board acted as both prosecutor and judge. Plaintiffs cite several cases in support of their position. These cases include: *Wilcox* v. *Supreme Council of Royal Arcanum*, 210 N. Y. 370; *Madden* v. *Atkins, supra; Miller* v. *Building Service Maintenance & M. Emp. U.*, 211 N. Y. S. 2d 459[2]; and *Willis* v. *Davis*, 233 S. W. 1035 (Tex. Civ. App.). Plaintiffs urge that we accept the findings of these cases which, they say, demonstrate that members of an association who have been accused of wrongdoing cannot

2. In this case, decided by a referee, it was held that since the plaintiff had, prior to his expulsion, filed charges against four of five trial board members the findings of the board removing him from office were "worthless." However, this decision was reversed in *Miller* v. *Building Service Maintenance & M. Emp. U.*, 226 N. Y. S. 2d 697, 700, by the Appellate Division of the Supreme Court of New York, the court stating:

> It is not the concern of the court here to provide all the safeguards of due process in a criminal prosecution. In the latter, not only the possibility of bias but the appearance of it must be avoided. Here the object of the court is to see to it that actual unfairness has not attended the proceeding (see Summers, The Law of Union Discipline, 70 Yale L. J. 175). Here the charge was substantial, it was properly made, and the plaintiff, in effect, pleaded guilty to it. He should not now be heard to complain.

sit in judgment in an expulsion proceeding over the very people who made the accusations in the first instance.

However, we believe that the better-reasoned approach to the dilemma into which plaintiffs seek to place Certified is found in *Green* v. *Board of Trade*, 174 Ill. 585, and *Hall* v. *Morrin*, 293 S. W. 435 (Mo. App.). In *Green* plaintiff sought to enjoin defendant from trying him for a violation of its by-laws. One of the plaintiff's arguments, which is found at page 590 of the court's opinion, is:

> . . . that the appointment of a committee to investigate and determine whether charges shall be preferred against him, from the members of the board of directors, who are to constitute the body to try him, would make his judges his prosecutors who had prejudged his case, and therefore the rule is unreasonable, illegal, and void.

The court disagreed with plaintiff's argument. At page 592 the court states:

> The fact that the charges are preferred by a member of the board of directors which is to try the accused would not be cause for interference by a court of equity to prevent a trial. To assume in advance that such a board would not give a member a fair trial is to deny to such a body the reputation for justice and fair dealing which commercial and mercantile associations have always enjoyed. It is to assume that men will not deal fairly with one of themselves. Such presumption cannot be entertained. If the fact that charges were preferred by a member of a board of directors would prevent a hearing by them on charges, it would also apply in case the power of trial was lodged in the body of the members, as it frequently is. If the board of eighteen directors would be disqualified from trying a member because one or two had prejudged his case, and a court of equity would on that ground interfere by injunction to prevent a trial, then one or two members of the board who might have prejudged

> the case favorably to the member to be tried could prevent a trial by announcing the fact that they had prejudged the case.

In *Hall* v. *Morris, supra,* the plaintiff also argued that the defendants, as members of the executive board, were disqualified from hearing the expulsion proceeding brought against him by reason of their interest in the subject matter which would prevent them from giving plaintiff a fair and impartial trial. The court, at page 440, disagreed with plaintiff's theory:

> [I]n the case at bar, we find nothing to indicate that plaintiff's trial was unfair or that it was conducted other than in substantial conformity with the constitution. Certain of the authorities cited by learned counsel for plaintiff declare the wholesome doctrine that, when the rules of an order permit, the persons constituting the tribunal before which the trial is to be had must be such as have no interest in the subject-matter. We most heartily accede to this statement, but, in the case at bar, under the laws of the association the general executive board, as constituted, was the only body with original jurisdiction to hear and determine the charges lodged against plaintiff. If the general executive board was incompetent to try plaintiff, then it is manifest that he could not have been tried at all, and he might, as suggested by defendants, have committed any offense with impunity, no matter how derogatory to the interests of the association, so long as he was careful at the same time to include therein some slander against the members of the general executive board. Or, if the argument is carried to its logical conclusion and plaintiff's theory adopted that the tribunal could never be composed of persons having a possible interest in the subject-matter, in the event that a member of an organization should slander the entire membership of his association, no one competent to try him could be found and the association would be thus rendered utterly helpless to defend itself against such member's attacks,

no matter how vicious or unwarranted they might have been.

> There are many instances that occur to us in which the members of the tribunal, before which the hearing is had, are either directly or indirectly affected by the offenses alleged to have been committed. Courts cite and try persons for contempt. Directors of boards of trade and stock exchanges try members for offenses which have injured the very directors sitting in judgment, and similar practice is to be found in the cases of police boards, medical societies, bar associations, clubs, and other social organizations. *We conclude, therefore, that, inasmuch as the manner of plaintiff's trial was governed by the contract existing between him and the International Association, and inasmuch as the hearing appears to have been conducted in substantial conformity with the laws and rules of practice provided in the constitution by which he had agreed to be bound, his objections to the validity of his trial and conviction are not well taken.* [Emphasis ours.]

See also *Gottlieb* v. *Economy Stores*, 199 Va. 848, which involved the expulsion of a member from a retail grocers association.

In the instant case Certified's Board was the only body which could determine whether to expel a fellow member. When plaintiffs joined Certified they agreed, as per their contract, to abide by the rules and regulations of the corporation's by-laws, one of which provided that the Board could "for good cause, and in its discretion" expel a member. Article II, Section 22 of the by-laws makes expulsion the sole responsibility of the Board. A determination of expulsion by any other body would be invalid.

We would also point out that the trial judge disagreed with plaintiffs' argument in relation to the impartiality of the Board when he said:

> There was much made of the fact that the Board was a prejudiced body, and I don't think that is appro-

> priate. I think, as the members of the Board of Directors, they have an absolute duty to run the affairs of that association; and I think they cannot be put in a position where they have to abdicate their responsibilities because somebody charges them with prejudice when they are called upon to rule on something, because they could then be compelled to disqualify themselves any time they take any action that offends an individual shareholder so the Board would have no function whatsoever.

Plaintiffs' second due process argument is that at no time were they given an opportunity to face their accusers. They complain that they were denied this right because Henry Vinci, Chairman of the Board, did not testify and, in fact, no witnesses were offered who could be cross-examined. Plaintiffs' counsel called Mr. Vinci to be sworn and testify, but he refused. After a discussion on plaintiffs' request that the Board direct Mr. Vinci to testify, the Board adopted a resolution "that Mr. Vinci or any other employee of this corporation have the right to testify or not to testify at this hearing, and the Board will not direct or request any employee to testify or refrain from testifying."

The Board's resolution was in conformity with their authority as provided within the by-laws. The Board has no subpoena power and therefore it could not compel the attendance of witnesses nor request testimony from any person who may be present. In a similar situation the court in *Parsons College* v. *North Central Association of Colleges & Secondary Schools, supra,* 73, stated:

> Since the Association has no power to summon witnesses or to compel them to testify, to require the full panoply of the procedure of a judicial trial would frequently make it impossible for the Association to act. Cf. People ex rel. Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N. E. 2d 635, 58 A. L. R. 2d 899 (1956).

From our review of plaintiffs' due process arguments we conclude that the proceedings before the Board were conducted in conformity with the by-laws which all of Certified's members, including plaintiffs, agreed would govern. Plaintiffs were given written notice of the hearing; they were served with a copy of the charges; they, along with their attorney, were present throughout the hearing although counsel is not required by Certified's by-laws or by Illinois law (*Green* v. *Board of Trade, supra*); they were allowed to examine all exhibits introduced to support the charges against them; and they were allowed the opportunity to rebut or disprove the evidence presented against them which they chose not to do except by introducing evidence of their good character and standing as members of Certified.

In *Parsons College, supra*, plaintiff argued that the Association's procedures operated to deny it due process. The court stated at page 70:

> Invoking a claim of due process, the College draws no support from the commands of the federal Constitution, as contained in either the Fifth or Fourteenth Amendment. By their terms, these constitutional guarantees control only the action of government. Designed to guard the individual against the overweening power of the state, they do not control the voluntary arrangements or relations of private citizens in their private dealings with each other. . . . With a corporate charter granted under general law, the Association stands on the same footing as any private corporation organized for profit or not. . . . The termination of membership in a private association, organized to maintain the standards in a profession or calling, do not, therefore, present a federal question. See Rosee v. Board of Trade of City of Chicago, 311 F. 2d 524 (7th Cir. 1963). In a case involving an attack on the accreditation actions of this same Association, the court declared, "[I]t is vain to appeal to a constitutional bill of rights,

for such bills are intended to protect the citizen against oppression by the government, not to afford protection against one's own agreements." State of North Dakota by Langer v. North Central Association, 23 F. Supp. 694, 700 (E. D. Ill. 1938), affirmed, 99 F. 2d 697 (7th Cir. 1938). The term "due process" is thus something of a misnomer in this field.

Plaintiffs next contend that their free speech rights should be protected by this court. They claim that there is state action infringing on their constitutional rights since Certified is chartered by the State of Illinois and authorized to do business in Illinois. However, this same argument has been specifically rejected in *Van Daele* v. *Vinci*, 294 F. Supp. 71 (N. D. Ill. 1968), and *Rosee* v. *Board of Trade*, 311 F. 2d 524 (7th Cir. 1963). In *Van Daele, supra*, 74, the court in discussing plaintiff's claim stated:

> [T]he defendants did not act under color of law, required expressly by § 1983 and held applicable also to § 1985(3). See Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253 (1951); Huey v. Barloga, 277 F. Supp. 864 (N. D. Ill. 1967). The defendants are private individuals and a private corporation. The only factual basis the plaintiff asserts in support of his allegation of state action is that Certified received its charter under state law and that it acted pursuant to by-laws adopted under its charter in the expulsion action. Merely acting under a state license is not state action within the context of the civil rights acts. Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W. D. Pa. 1968).

In the instant case we find no state action which would allow us to protect plaintiffs' free speech rights.

It is next argued by plaintiffs that they may assert defensively the First Amendment free speech clause, through the Fourteenth Amendment, in the same manner as advanced in *New York Times Co.* v. *Sullivan*, 376 U. S. 254

(1964). In *New York Times Co.* the Alabama courts applied a state rule of law which petitioners claimed imposed invalid restrictions on their constitutional freedoms of speech and press. In the instant case plaintiffs do not claim that any "state rule of law" infringes on their rights. Rather plaintiffs argue that it was the action of Certified's Board which violated their First Amendment rights. We find that the expulsion proceedings conducted by the Board were private in nature and that the Board's action did not pose a question of infringement of plaintiffs' First Amendment rights. See *Rosee* v. *Board of Trade, supra,* 526.

It is also urged by plaintiffs that court enforcement of the Board's resolutions would amount to state action under the principles announced in *Shelley* v. *Kraemer,* 334 U. S. 1 (1948). However, as heretofore determined by us, the proceedings affecting plaintiffs' membership status were private in nature and did not constitute state action or action under color of state law.

Defendants also contend that the injunctions were improperly issued since plaintiffs had not shown any proper grounds for an injunction. They argue that any damage which might have been sustained by plaintiffs was ascertainable and that plaintiffs had not proven irreparable injury. However, since we have determined to reverse the injunction orders, we need not consider this contention.

The order of September 30, 1969, granting the permanent injunction, and the order of May 5, 1969, granting the temporary injunction, which became merged into the judgment of September 30, are reversed.

REVERSED.

STAMOS, *P. J.*, and ENGLISH, *J.*, concur.

INDEX

PAGE

(1) This Court will not grant certiorari where the judgment below is based on state law 1

(2) The decision below rests upon an adequate, independent basis in Illinois law 3

(3) The cases cited by petitioners are not in point 4

Conclusion 4

TABLE OF AUTHORITIES

Cases

Allen v. Arguimbau, 198 U.S. 149, 154-155 (1905) 2

Bowe v. Scott, 233 U.S. 658, 665 (1914) 3

Cuyahoga Power Co. v. Northern Realty Co., 244 U.S. 300, 304 (1917) 2

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) 2

Hudson v. Illinois, 405 U.S. 965 (1927) 2

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 491-2 (1965) 2

Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934) 2

McGoldrick v. Gulf Oil Corp., 309 U.S. 2, 3 (1939) 2

Miller v. Cornwall Railroad Co., 168 U.S. 131, 134 (1897) 3

New York Central Railroad Co. v. New York, 186 U.S. 269, 273 (1902) 2

PAGE

Ryan v. Cudahy, 157 Ill. 108, 121 (1895) 3

Stembridge v. Georgia, 343 U.S. 541, 547 (1952) 2

Virgin v. American College of Surgeons, 42 Ill.App.2d 352, 369 (1st Dist. 1963) 3

Constitutional Provisions and Statutes

United States Constitution, 14th Amend. 4

Illinois Constitution of 1870, Art. II, Sec. 2 3

Illinois Constitution of 1970, Art. I, Sec. 2 3

28 U.S.C. § 1257(3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-353

CERTIFIED GROCERS OF ILLINOIS, INC., et al.,
Petitioners,

vs.

SPARKLE FOOD CENTER, INC., and HICKORY HILLS SUPER MART, INC.,
Respondents.

BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for writ of certiorari should be denied because the judgment of the Illinois Supreme Court is not based upon the United States Constitution, but rather rests upon an independent, adequate basis in Illinois law.

(1)

This Court will not grant certiorari where the judgment below is based on state law.

This Court will not review on certiorari the judgment of a state court which is based upon an independent and ade-

quate state ground. In such cases, this Court has no jurisdiction under 28 U.S.C. §1257(3). *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 491-2 (1965); *Hudson* v. *Illinois*, 405 U.S. 965 (1927); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935); *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934).

Where a state court decision does not specifically indicate that it was based upon a federal ground, or it is unclear what ground was relied upon, and an independent state ground supports the decision, this Court will deny certiorari. *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1951); *Cuyahoga Power Co.* v. *Northern Realty Co.*, 244 U.S. 300, 304 (1917); *Allen* v. *Arguimbau*, 198 U.S. 149, 154-155 (1905).

In *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 2, 3 (1939), this Court dismissed a writ of certiorari to the Court of Appeals of New York for want of jurisdiction, saying:

> "In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of the tax solely because of a violation of the federal Constitution, we are unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground. [Citing cases]."

Accord: *New York Central Railroad Co.* v. *New York*, 186 U.S. 269, 273 (1902); and *Lynch* v. *New York ex rel, Pierson*, 293 U.S. 52, 54-55 (1934), wherein this Court said:

> "[I]f it does not appear upon which of two grounds the judgment was based and the ground independent of the federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. [citing cases.]"

(2)

The decision below rests upon an adequate, independent basis in Illinois law.

The Supreme Court of Illinois based its decision upon Illinois law. The reference in the Court's opinion to "due process of law" (A. 7) refers to the common law of Illinois, which for many years has required that expulsion proceedings of private business associations must not be "influenced by bias, prejudice or lacking in good faith," and cannot be "contrary to rudimentary due process or natural justice." *Virgin* v. *American College of Surgeons*, 42 Ill. App.2d 352, 369 (1st Dist. 1963); see also *Ryan* v. *Cudahy*, 157 Ill. 108, 121 (1895).

In *Bowe* v. *Scott*, 233 U.S. 658, 665 (1914), this Court said of a reference in a pleading to "due process of law":

> " . . . But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. [Citing cases.]"

Accord: *Miller* v. *Cornwall Railroad Co.*, 168 U.S. 131, 134 (1897).

The Illinois Constitution provides (1870 Const., Art. II, Sec. 2; 1970 Const., Art. I, Sec. 2):

> "No person shall be deprived of life, liberty or property without due process of law . . . "

There is no reference in the Court's opinion to any provision of the United States Constitution or statutes, or to any federal case. The Court simply did not have reference to or rely upon the federal Due Process Clause in reaching its decision.

(3)

The cases cited by petitioners are not in point.

The cases cited in the Petition deal with issues of "state action" under the 14th Amendment Due Process Clause. These issues were discussed by the Illinois Appellate Court (A. 28-29), but were not reached by the Illinois Supreme Court. Rather, the judgment of the Illinois Supreme Court is grounded completely upon Illinois law.

Conclusion

This case is not one of nationwide importance, since it involves only Illinois law, and is a precedent only in that State.*

The decision below is based upon an adequate, independent state ground, and is not based upon federal law. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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September 25, 1972

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* In August, 1972, Certified took a simple step to avoid the decision of the Supreme Court of Illinois. Its members adopted a new by-law providing for review of disciplinary proceedings by the American Arbitration Association.

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CERTIFIED GROCERS OF ILLINOIS, INC., ET AL.,
Petitioners,

vs.

SPARKLE FOOD CENTER, INC., ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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INDEX.

PAGE

Reasons for granting the writ

I. The Illinois Supreme Court Decided a Federal Constitutional Question 1

II. If a State Court Decision Is Ambiguous This Court May Remand for Clarification 5

Conclusion 6

AUTHORITIES CITED.

Cases.

Black v. Cutter Laboratories, 351 U. S. 202 (1956) 1

Department of Mental Hygiene of California v. Kirchner, 380 U. S. 194 (1965) 6

Durley v. Mayo, 351 U. S. 277 (1956) 3

Klinger v. Missouri, 13 Wall 257 (1872) 4

Konigsberg v. State Bar, 353 U. S. 252 (1957) 3

Minnesota v. National Tea Co., 309 U. S. 551 (1940) ... 5

Neilson v. Lagow, 12 Howard 98 (1851) 2

Shoemaker v. Randell, 10 Peters 391 (1836) 2

State Tax Commission v. Van Cott, 306 U. S. 511 (1939) 5

West Chicago St. R. Co. Rd. v. Illinois *ex rel.* Chicago, 201 U. S. 506 (1906) 3

Williams v. Kaiser, 323 U. S. 471 (1945) 4

Wood v. Chesborough, 228 U. S. 672 (1913) 3

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondents argue that the judgment of the Supreme Court of Illinois rests upon an independent, adequate state ground and that therefore the petition for a writ of certiorari should be denied. The Illinois Court did not state or otherwise indicate that it was deciding the due process issue on state grounds, and the record and the nature of the case demonstrate that the Court based its decision on the Federal Constitutional ground.

I. THE ILLINOIS SUPREME COURT DECIDED A FEDERAL CONSTITUTIONAL QUESTION.

This Court has said that it will determine for itself the precise ground of judgment of the state court. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 298 (1956). In order

for this Court to have jurisdiction to decide a Federal Constitutional issue, it is not required that the issue be raised and decided in direct and positive terms but a sufficient jurisdictional basis exists where the question must have been raised and must have been decided to reach the result of the case. *Shoemaker* v. *Randell*, 10 Peters 391 (1836). To determine the actual basis of the state court decision, this Court will search the entire record of the proceeding, including that of the state inferior courts. *Neilson* v. *Lagow*, 12 Howard 98, 99 (1851).

Since the Supreme Court of Illinois did not explicitly state that it was deciding the case on the basis of Federal Constitutional due process, an analysis of the argument presented by counsel before the Supreme Court of Illinois is necessary. The brief filed by the Respondents in support of their due process argument before the Illinois Court demonstrates that respondents' argument was based upon the Federal Constitution (Respondents' brief is part of the record filed in this Court).

In their brief, Respondents cited only four Illinois Supreme Court cases in support of their due process argument. None of those cases supports a decision by the Illinois Court on other than Federal Constitutional grounds. The decision in *Railway Conductors' Benefit Association* v. *Robinson*, 147 Ill. 138, 159 (1893), involved a contract right and was not based on Illinois Constitutional guarantees but on the constitution of the association. In the second case, *Smith* v. *Department of Registration and Education*, 412 Ill. 332, 341 (1952), the Supreme Court of Illinois discussed and decided the Federal Constitutional issue and then noted that the state provisions were similar to the Federal. The case of *People ex rel. Pryblinski* v. *Scott*, 19 Ill. 2d 300 (1st Dist. 1960) involved the rights of an accused in a criminal case and was thus not remotely related to the

issues here. In *Ryan* v. *Cudahy*, 157 Ill. 108 (1895) and in the Illinois Appellate Court case on which Respondents placed heavy emphasis, *Virgin* v. *American College of Surgeons*, 42 Ill. App. 2d 352 (1st Dist. 1963), the Court based its decision for plaintiffs on the defendants' violation of the association's by-laws.

Respondents' argument in the Supreme Court of Illinois rested upon *In Re Murchison*, 349 U. S. 133, 136 (1955), and *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970), which were decided on Federal Constitutional grounds. Respondents repeatedly and prominently cited these cases in their brief before the Supreme Court of Illinois and in their oral argument before the Illinois Appellate Court. After the decision in *Goldberg* was handed down, Respondents seized upon the holdings of *Goldberg* and *Murchison*, citing these two cases as their prime authority for every conceivable argument. Respondents now attempt to avoid a decision on the merits of that argument by asserting that the Illinois decision was based on independent and adequate state grounds.

Even if the decision of the Illinois Supreme Court had been squarely decided on state grounds this Court will determine if those grounds were independent and adequate to support the decision. *Wood* v. *Chesborough*, 228 U. S. 672, 676-680 (1913); *West Chicago St. R. Co. Rd.* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-20 (1906). In *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956), this Court held that its jurisdiction could be established by demonstrating that the alleged non-federal grounds could not account for the state decision. Where prior state court decisions tend to show that the alleged non-federal grounds are nonexistent, jurisdiction is established. See *Konigsberg* v. *State Bar*, 353 U. S. 252, 257 (1957).

The case now before the Court falls squarely within the

doctrine of these cases. The ruling of the Supreme Court of Illinois is inconsistent with a long line of previous Illinois cases holding that courts would intervene in the internal affairs of a private, voluntary association in the exercise of their coercive powers only to insure compliance with the association's internal law. (This was recognized by Chief Justice Underwood in his dissenting opinion. The cases cited therein vigorously support that position.) The Supreme Court of Illinois specifically found that the procedures of the disciplinary hearing in question were in compliance with those prescribed by the by-laws of Certified. In deciding that the procedures followed violated the due process rights of Respondents, the Supreme Court cited no Illinois cases in support of its position nor did it seek to distinguish the cases cited by petitioner. The decision must be interpreted to mean that the due process clause applies to a voluntary association even though compliance with the association's by-laws, rules and regulations is demonstrated. This interpretation is unprecedented in and in direct contradiction to Illinois statutory, judicial or constitutional law. Clearly the general citations of cases from other jurisdictions do not provide independent, adequate state grounds in Illinois law. Therefore, the Supreme Court of Illinois could not have based its decision on state grounds. Since an adequate state ground cannot be raised to support the state court judgment "it will be presumed that the state court based its judgment on the law raising the Federal question and, this Court will take jurisdiction." *Klinger* v. *Missouri*, 13 Wall 257, 263 (1872); *Williams* v. *Kaiser*, 323 U. S. 471 (1945).

If this Court denies review in this case, the effect will be to allow a decision of the Supreme Court of Illinois to stand which could not have been predicated upon Illinois law but rather was based on an erroneous interpretation of

the Federal Constitution, an interpretation, moreover, that will have far reaching consequences on private voluntary associations.

Respondents contend that this case is unimportant in terms of nationwide importance. But this ignores reality. Because many unincorporated associations such as the Chicago Board of Trade are located in Illinois, the Illinois courts must often decide cases involving voluntary associations. As a result, Illinois decisions are frequently cited as controlling authority by other jurisdictions, and this case, founded on an erroneous Constitutional basis, will undoubtedly affect the course of future decisions.

II. IF A STATE DECISION IS AMBIGUOUS THIS COURT MAY REMAND FOR CLARIFICATION.

In a case where the state court opinion is ambiguous so that this Court is unable to ascertain the actual holding of the state court, the case may be remanded for further consideration and clarification. *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *State Tax Commission* v. *Van Cott*, 306 U. S. 511 (1939). In the case of *Department of Mental Hygiene of California* v. *Kirchner*, 380 U. S. 194 (1965) the case was remanded for clarification on the grounds that in reaching its decision the California Supreme Court had failed to specify whether its decision was based on the equal protection clause of the Fourteenth Amendment on a similar provision in the California constitution or both.

As an alternative to finding the Supreme Court of Illinois did in fact decide the Federal Constitutional issue, the case should be remanded to the Supreme Court of Illinois for clarification.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

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